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Filing Date 1/15/2002  
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RECEIVED  
MAR 26 2002  
OFFICE OF PETITIONS

PETITION UNDER 37 CFR § 1.10(d)  
TO ESTABLISH THE USPS EXPRESS MAIL DEPOSIT DATE AS THE FILING DATE

Sir:

This is a Petition under Rule 1.10(d) to establish October 23, 2001 as the filing date of the above-identified application.

Background

Applicants filed the above-identified application by the Express Mail procedure from Charlotte, North Carolina on October 23, 2001. The package carried Express Mail label No. EL921582080US. On February 28, 2002 Applicants' undersigned attorney of record received the Official Filing Receipt. The Filing Receipt carries a mailing date of February 22, 2002 and indicates a filing date of January 15, 2002 rather than the October 23, 2001 Express Mail filing date. On information and belief, January 15, 2002 is the date the Express Mail package containing the application was finally delivered to the Office.

Chronology

This application was originally drafted by Philip Summa, who is also undersigned counsel of record for this application and this petition (Summa Declaration ¶ 6-8).

On October 22, 2001, in-house counsel for Cree, Inc. (Applicants' employer), having reviewed a draft of the application, authorized Mr. Summa to file it immediately (Summa Declaration ¶ 6).

On October 22, 2001, Mr. Summa immediately instructed his patent paralegal, Mary V. Federal ("Molly") to prepare the application and the relevant transmittal materials (Utility Patent Application Transmittal Sheet, Fee Calculation Sheet, return postcard, and Express Mail label) for filing the next day (Summa Declaration ¶ 7; Federal Declaration ¶ 7-8). Mr. Summa attached a memo with a notation, "10/22/01 Let's file this on Tuesday." (Federal Declaration ¶ 7-8)

On October 23, 2001, upon completion of these documents, Ms. Federal gave them to Mr. Summa for his final review and signature. The signed documents and check No. 3656 in the amount of \$1322.00 for the filing fees were then placed in an Express Mail envelope, bearing label No. EL9215820803US (prepared by Ms. Federal) and the envelope was then sealed. (Federal Declaration ¶ 8) (Summa Declaration ¶ 8)

In 1997, Mr. Summa had established an Express Mail Corporate Account (No. X282886) with the United States Postal Service (USPS) for the specific purpose of making sure that Express Mail packages always carried proper postage. Accordingly, Ms. Federal placed appropriate postage on the package by affixing a USPS Express Mail Label 108, indicating "postage and fees paid," which together with our Express Mail Corporate Account No. X282886, printed on the Express Mail label, ensured proper postage. (Federal Declaration ¶ 9) (Summa Declaration ¶ 9).

As is Ms. Federal's practice, she made a copy of the Express Mail label, the return postcard, and the check for filing fees and placed it in a file labeled "Express Mail & Courier Receipts," so that she could reconcile the Express Mail Corporate Account statement upon receipt from the Post Office. (Federal Declaration ¶ 10)

Apparently, because of the decontamination processing of mail being sent to the PTO, there were several Express Mail packages which Summa & Allan, P.A., had sent to the PTO, but for which the firm had not yet received its usual confirmation, such as our return postcard or an Express Mail label (*i.e.*, the carbon copy). On November 13, 2001, in order to determine the status of these packages, Ms. Federal phoned the telephone number listed on an Express Mail Label for tracking a package. (Federal Declaration ¶ 11)

In this case, after calling the tracking number, the USPS verbally confirmed that the Post Office had received the package on October 23, 2001. Ms. Federal then made a notation on the copy of the Express Mail label, "11-13-01 PO shows it rec'd this on 10-23-01. No further info." (Federal Declaration ¶ 12)

On November 26, 2001, Ms. Federal again phoned the USPS tracking number on November 26, 2001, and made the notation "11-26-01 no info" on the copy of the Express Mail label. (Federal Declaration ¶ 13)

On February 7, 2002, Summa & Allan, P.A. received the return postcard for this application from the PTO, and Ms. Federal noted that the filing date was shown as 01/15/2002. Because the firm had not received the Express Mail label back from the USPS, and because Ms. Federal knew documentation would be needed as evidence of the actual and proper mailing of the package on October 23, 2001, Ms. Federal again called the USPS tracking service in order to obtain such documentation. Because the package had been delivered by that time, the initial document sent to Summa & Allan, P.A. by the USPS reported the date the package had been delivered, but not showing when it had originally received the package. Twice again Ms. Federal requested documentation showing the mailing date, and twice again received the same documentation showing only the delivery date. Ms. Federal then spoke with a supervisor at the tracking service and was told that she needed to contact the Express Mail facility in Charlotte, NC, to get the requested documentation. Ms. Federal then spoke with a USPS employee in that office and requested documentation of the fact that the USPS had possession of the package on October 23, 2001. On February 13, 2002, Summa & Allan, P.A. received (by mail) a document headed "Product Tracking System; Label Event Details," which shows Express Mail label No. EL921582080US was "ENROUTE" in Charlotte, NC on 10/23/2001 at 19:28. (Exhibit 8) (Federal Declaration ¶ 14)

To obtain further evidence of the mailing date, Ms. Federal went to the USPS website (USPS.com) and printed the Shipment History for Express Mail label No. EL921582080US, which also showed the package "ENROUTE, October 23, 2001, 7:28 pm." (Exhibit 8 to the Petition) (Federal Declaration ¶ 15)

Additional details about the preparation and Express Mail filing of the application, and about its status since October 23, 2001, are set forth in the accompanying Declarations of Philip

Summa and Mary V. Federal attached hereto, and which are incorporated entirely herein by reference.

The Declarations of Patricia D. Vaughan and Andrea B. Crumpler are also attached hereto and are incorporated entirely herein by reference.

Petition

Applicants file this petition under 37 C.F.R. 1.10(d) because (i) the Office has received the application; and (ii) the USPS has never returned Applicants' copy of the Express Mail label.

This petition is being filed within 30 days of the mailing date of the official filing receipt and thus Applicants submit that it is being filed promptly; 37 C.F.R. 1.10(d)(1).

The application carried Express Mail label number EL921582080US; 37 C.F.R. 1.10(d)(2). A copy of the Utility Patent Application Transmittal sheet showing the Express Mailing Label EL921582080US is enclosed herewith as Exhibit 6.

Additionally, a product tracking sheet from the USPS is enclosed and shows that the package carrying the above Express Mail label was received and en route from Charlotte as of October 23, 2001 at 7:28 P.M. (Exhibit 8).

Finally, a tracking report from the USPS.com website is enclosed which also shows that the package was en route on October 23, 2001 at 7:28 P.M (Exhibit 9).

Applicants also respectfully call the Office's attention to the Notice provided by the Office of Patent Legal Administration concerning, "Patent applications submitted to the United States Patent and Trademark Office between September 11, 2001 and December 1, 2001 via the United States Postal Service." This document acknowledges some of the mailing difficulties faced by the Office, Patent Applicants, and the general public during the time period in question, and suggests petitions under 37 C.F.R. 1.10 as an appropriate remedy.

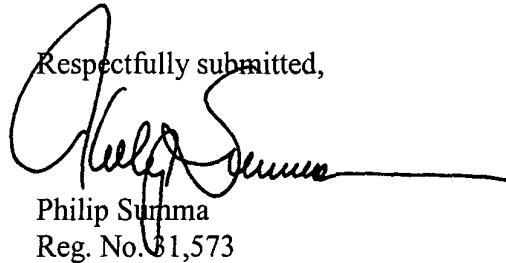
Applicants also submit that the Office's actual receipt of the above-referenced Express Mail package is further evidence of Applicants' proper sending of it, and that the delay from October 23, 2001 through the official receipt and filing date of January 15, 2002 is entirely

consistent with the unexpected delays caused by the unfortunate circumstances of actual and potential anthrax contamination affecting postal service deliveries to and from the Washington, D.C. area during the time period in question.

As further set forth in the accompanying declarations, all of the staff members of Applicants' legal representative are familiar with the advantages—and occasionally the requirements—of obtaining a particular filing date for a U.S. patent application, and all know and follow the procedures necessary for making sure that an Express Mail package containing a U.S. Patent Application carries the proper postage and is deposited properly with a USPS facility prior to the last Express Mail pickup of the day at such facility. Applicants further submit that such proper Express Mailing procedures are the routine practice of Applicants' undersigned representatives.

Accordingly, Applicants respectfully submit that their petition meets all of the requirements for grant, and respectively ask that the Commissioner grant the October 23, 2001 filing date requested herein for the application.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Philip Summa", with a long horizontal flourish extending to the right.

Philip Summa  
Reg. No. 31,573

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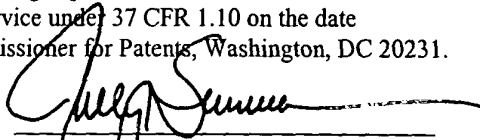
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CERTIFICATE OF MAILING UNDER 37 CFR 1.10

Express Mail Label Number EV047158412US  
Date of Deposit: March 22, 2002

I hereby certify that this correspondence is being deposited with the United States Postal Service "Express Mail Post Office to Addressee" service under 37 CFR 1.10 on the date indicated above and is addressed to Assistant Commissioner for Patents, Washington, DC 20231.

  
Philip Summa